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1 BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

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3 NFL ENTERPRISES LLC,

4

Complainant,

5 v. MB Docket

No. 08-214

6 COMCAST CABLE,

COMMUNICATIONS LLC, File No.

7 CSR-7876-P

8 Defendant.

9

10 Volume 6

transcript

11 The Federal Communications Commission

12 445 12th Street, SW

Hearing Room TW-A363

13 Washington, D.C. 20554

14 Wednesday, April 15, 2009

15

16 9:30 a.m.

17

18

19 BEFORE:

20

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22 Chief Administrative Law Judge

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6	Ronald Furman		
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7	By Mr. Perez-Marques	1124	1227
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2 9:36 a.m.

3 JUDGE SIPPEL: Let's go on the
4 record. This is the 15th of April. Some call
5 it Tax Day. But this is actually a hearing
6 day and we still have Dr. Singer on the stand
7 under cross examination by Mr. Burke. I do
8 have some -- However, before we proceed any
9 further, I do have some preliminary matters,
10 a preliminary matter, and I think you all are
11 aware of it.

12 You could stay where you are, sir,
13 or you can walk around if this gets too
14 laborious, but we're going to probably be
15 about 10 or 15 minutes on this.

16 THE WITNESS: I think this is the
17 most comfortable chair in the room.

18 JUDGE SIPPEL: Probably is. Okay.
19 It is?

20 (Laughter.)

21 All right. And I want to be sure
22 that I don't do what I did yesterday and

1 inadvertently overlook the Bureau because I'm
2 very interested in the Bureau's views on this.
3 In fact, you can start, Mr. Schonman, if you
4 want.

5 We have the letter from counsel
6 for Bloomberg and he raises some very, I
7 think, interesting but also very serious first
8 consideration matters with respect to my
9 exclusion of yesterday. I was very broad with
10 it thinking that the fact that this is an
11 expedited case by the Commission. It's a
12 question of weighing time versus I guess what
13 really is a 1st Amendment issue and I sort of
14 came out on the time, maybe too much too
15 quickly.

16 So I want to flesh this out. I've
17 got some ideas in terms of where I want to go
18 from here. But let me first hear. Have you
19 seen the letter from Bloomberg?

20 MR. SCHONMAN: I have seen the
21 letter, Your Honor, and certainly the
22 information that we're trying to protect here

1 is the confidential information of the named
2 parties in the case. They are entities with
3 the interest in protecting that information.
4 Traditionally, of course, these
5 hearings have been opened to the public. I
6 think to the extent that Your Honor can
7 accommodate the press and the named parties in
8 the case and their interest in protecting the
9 information that would be most favorable. I
10 think it's up to the named parties to try to
11 work out some arrangement here where they can
12 accommodate Your Honor's interest in carrying
13 forth the tradition of having an open hearing
14 to the extent that's possible.

15 MR. SCHMIDT: And, Your Honor, we
16 actually did, Mr. Carroll and I, had the
17 chance to speak about this this morning and I
18 think a very straightforward resolution that's
19 not already proposed that makes sense to us
20 which is simply that there be a redacted
21 transcript prepared as it becomes available
22 where the parties have the chance to redact

1 out the confidential information and then the
2 other information can be known by the public.
3 And the only accommodation that we would ask
4 for in that regard is just that we recognize
5 that the reporter has a lot on her plate in
6 terms of preparing the transcript. So we then
7 just have a very brief period to go through
8 it.

9 JUDGE SIPPEL: Are we getting our
10 -- Is somebody getting overnight on this?

11 MR. SCHMIDT: That's what we're
12 aiming to do, Your Honor.

13 MR. CARROLL: We have asked for
14 daily. I think we just received Monday's
15 transcript and I don't know when we will
16 receive yesterday's transcript. But we're
17 starting off the day in agreement once again.
18 I would --

19 JUDGE SIPPEL: I always suspect
20 that. I get suspicious. Go ahead, Mr.
21 Carroll.

22 MR. CARROLL: But I agree that I

1 think it was the Bloomberg gentleman who in
2 the submission to Your Honor last evening
3 proposed this as a compromised arrangement
4 under which the live testimony itself would be
5 closed. But as soon as the transcripts are
6 turned out on a daily basis, they would be
7 quickly expeditiously reviewed by each side
8 redacting out what's highly confidential in
9 them and then the transcripts will be made
10 available to the public. We are fine with
11 that on the Comcast side of a way to
12 accommodate both the interests of the parties
13 themselves in the proceeding and their
14 confidential information and the 1st Amendment
15 interest of the press and having access to
16 that information.

17 JUDGE SIPPEL: Well, you know that
18 sounds like a very reasonable approach and I
19 agree that with your -- that's pretty much
20 precisely what Mr. Glasser said in his letter
21 which I thought again was a very reasonable
22 compromise.

1 But I've got the ultimate
2 responsibility for how this hearing is
3 conducted and I have a very strong leaning
4 towards openness. Sure, there are reasons to
5 treat some things as confidential. I think
6 the most significant is if it's personal
7 matter and I've had many situations like that
8 come up. But that's relatively easy to handle
9 because it's usually just a one party
10 situation and it's just a one item situation.
11 This is spread all over the lot.

12 And I agree that there needs to be
13 a lot of tight confidentiality with respect to
14 discovery because discovery goes all over the
15 place. But this is the day of reckoning and
16 I don't think there's the same considerations
17 with respect to protecting discovery business
18 material and a hearing where it's a public
19 hearing and there's a lot of interest in terms
20 of why decisions are being made in this case
21 and how they're being made and it's hard for
22 anybody to understand it without being here.

1 Now I think that I want to start
2 with the compromise and I'm very much in favor
3 of that, although I would ask if there's any
4 way that you can expedite better, faster,
5 those transcripts and it's up to the parties
6 to get the copies made, whatever Mr. Fiske up
7 here needs, and you know have a dozen copies
8 or what not and get them in his office the
9 next morning or as close as you can. And also
10 I would ask that you be very, very careful
11 with the redact.

12 Now I heard Mr. Hawkins testify
13 all day yesterday and I didn't hear a heck of
14 a lot of things in there that should be
15 redacted. I haven't had a chance to go back
16 and reread his transcript, this testimony, but
17 I would like by noon today or let me back up,
18 by the end of the day today I want his written
19 testimony to be out there on the press table
20 with redacts if you think that they're
21 appropriate and a copy to me because I want to
22 see what the redacts are.

1 MR. SCHMIDT: Well, Your Honor, I
2 don't have that.

3 JUDGE SIPPEL: I got it. I'll
4 give you mine if you want. It's written
5 testimony.

6 MR. SCHMIDT: Oh, his written
7 testimony?

8 JUDGE SIPPEL: Yes, sir.

9 PARTICIPANT: I'm sorry, Your
10 Honor.

11 JUDGE SIPPEL: Not the transcript.
12 His written testimony. I mean let's give the
13 public something for goodness sakes.

14 MR. SCHMIDT: We already have
15 redacted copies of the written testimony.

16 JUDGE SIPPEL: You do? Of the
17 transcript?

18 MR. SCHMIDT: Yes, Your Honor.

19 JUDGE SIPPEL: Well, let me have a
20 copy and then get the copies over to Mr. Fiske
21 so that he can -- that they're available for
22 the press today.

1 MR. SCHMIDT: IO think all of the
2 witnesses have redacted copies of their
3 written testimony. It's just the courtroom
4 testimony where there would need to be
5 redaction.

6 JUDGE SIPPEL: Well, as I say,
7 it's hard for me to -- I mean I haven't gone
8 through Mr. Hawkins line by line, but I
9 listened to him yesterday and I don't know
10 where you're going to find the commercially
11 sensitive information that he was testifying
12 to.

13 MR. SCHMIDT: Well, for example,
14 Mr. Carroll asked a few questions about dollar
15 figures involved.

16 JUDGE SIPPEL: All right. Dollar
17 figures may go.

18 MR. SCHMIDT: That would be one
19 example.

20 JUDGE SIPPEL: A dollar figure is
21 easy to get out. Let me give you another
22 example. I looked through -- Was it Mr.

1 Furman that's up today?

2 MR. SCHMIDT: Yes, sir.

3 JUDGE SIPPEL: And I think on the

4 last or the next to the last page of his

5 testimony it had specific names and specific

6 companies with some specific numbers.

7 MR. SCHMIDT: Absolutely.

8 JUDGE SIPPEL: Now that would go.

9 MR. SCHMIDT: Yes.

10 JUDGE SIPPEL: But I didn't see

11 anything else in there that should go.

12 MR. SCHMIDT: I think if Your

13 Honor looks -- I don't have that testimony in

14 front of me. But I think if Your Honor looks

15 that was probably the only information that

16 was redacted from Mr. Furman's testimony.

17 JUDGE SIPPEL: I hope so. I hope

18 so. But I would like to see those redacts

19 because I'm going to take a hard look at them.

20 This idea of super secret protection is -- I

21 fell for it yesterday. I mean I really did

22 and I keep thinking that this case has got to

1 be moved along. I don't have time to open the
2 door and close the door and open the door and
3 close the door.

4 MR. SCHMIDT: But I actually have
5 Mr. Furman's testimony.

6 JUDGE SIPPEL: You don't have to
7 give it to me now.

8 MR. SCHMIDT: No, I just want to
9 say --

10 JUDGE SIPPEL: Go ahead and tell
11 me.

12 MR. SCHMIDT: For the record.

13 JUDGE SIPPEL: I just read it. I
14 know it.

15 MR. SCHMIDT: Yes, he has about 20
16 paragraphs of testimony. The first 16 have no
17 redactions. I'm sorry. The first 17 have no
18 redactions and it's literally when you get to
19 those two paragraphs that Your Honor
20 referenced, 18 and 19.

21 JUDGE SIPPEL: Yes.

22 MR. SCHMIDT: Where he referenced

1 specific companies and specific --

2 JUDGE SIPPEL: Specific numbers.

3 MR. SCHMIDT: -- numbers that

4 that's where --

5 JUDGE SIPPEL: Those --

6 MR. SCHMIDT: Yes, and I think

7 that's the philosophy we applied. As I

8 understand it, that's the philosophy we

9 applied. So I'm not sure there's a

10 disagreement on what's covered and what's not

11 covered. It's just the logistics of getting

12 it out.

13 JUDGE SIPPEL: Well -- Go ahead,

14 Mr. Carroll.

15 MR. CARROLL: I agree with that,

16 Your Honor. I think for the direct testimony,

17 the direct written testimony, that has already

18 been done, redacted on both sides, and that's

19 easy because we've had the time to do it. The

20 problem as I understood it that it was created

21 yesterday and we've already had a day where my

22 cross of their witness has been in a closed

1 room.

2 Is that in live cross examination

3 in a rushed proceeding like this you cannot

4 plan in advance "Okay, this is the part where

5 I'll ask the super secret questions and this

6 is the part where I won't ask that." It's

7 asking too much to have an expedited

8 proceeding and you could see yesterday the

9 cross examination is very much on the fly.

10 It's very much back and forth and in the

11 middle of that as Mr. Schmidt said dollars and

12 cents numbers are coming out and being used.

13 There are some charts that have some numbers.

14 And that's the only information

15 that each side is looking to I think to

16 protect and I think that the proposal by the

17 Bloomberg gentleman which I thought was quite

18 a reasonable one when I read last night takes

19 care of that situation. It allows us in an

20 expedited proceeding just the time to check

21 that transcript quickly and take out those

22 dollar numbers before the press gets the

1 actual live transcripts.

2 The canned written submissions are
3 already redacted and there's no problem with
4 making those available. That's my
5 understanding.

6 JUDGE SIPPEL: All right. Well,
7 we just got finished with that. But if it's
8 a scope of the redactions that I'm also
9 concerned about. So I'll take your word for
10 it. You said that you're just taking numbers
11 out. There's no sense for me to see that.
12 That's all I'm interested in seeing going out.

13 But like what do I do with the
14 cross examination of Mr. Furman today? What
15 is wrong with letting the reporters in for
16 that?

17 MR. CARROLL: Well, I have two
18 issues. I don't think we should have a
19 proceeding where we change how we're doing it
20 in the middle of it because we had a
21 proceeding yesterday and the thing was closed
22 to the press and now we're going to open it up

1 to the press for certain witnesses and not
2 others. I think we ought to have a consistent
3 rule.

4 JUDGE SIPPEL: Well, maybe I made
5 a mistake yesterday.

6 MR. CARROLL: I don't think you
7 did.

8 JUDGE SIPPEL: Maybe I was sold a
9 bill of goods and maybe I sucker punched
10 myself. But why do I need Mr. Furman to be in
11 -- Why do you have to close it?

12 MR. CARROLL: Because the
13 information that's redacted from the direct
14 testimony, the direct written testimony he
15 submitted, will be subject to cross
16 examination by our side.

17 JUDGE SIPPEL: Right.

18 MR. CARROLL: And our side has
19 emails that are filled with the names of the
20 entities, the dollar amounts at issue and the
21 information that's been designated as highly
22 confidential information. Your Honor, on

1 this, the only thing I'd say is if you want to
2 have a proceeding that makes it more available
3 on a live time basis and we're not doing it on
4 this expedited rushed basis it might be
5 possible to do that, if we had another three
6 weeks to get organized in a different way.

7 But as Your Honor knows, we are
8 under a pretty severe time demand to get this
9 done on the basis that we're doing it and I
10 think the order that came down said in an
11 expedited fashion consistent with fairness and
12 justice at the same time. And I think that's
13 why I like the compromise. The compromise by
14 Bloomberg seems to recognize even though
15 they're on the 1st Amendment side clearly and
16 ably so. It recognizes that life's not
17 perfect when you're expediting things the way
18 we're expediting it and the lawyers on cross
19 ought to have the latitude to be able to go
20 with a certain issue that's highly
21 confidential whenever it is.

22 The alternative would be we have

1 people jumping up in the middle of the hearing
2 and running out in and out of the hearing.
3 Now I've had proceedings in Delaware, for
4 example, Courts that are M&A proceedings
5 where you have everybody wanting to know super
6 secret information about companies and
7 takeover battles and sometimes you have closed
8 sessions of those proceedings and sometimes
9 you have people running in and out and
10 sometimes -- There are ways of doing it, but
11 now when you've expedited it in that way that
12 we've expedited it here which again is why I
13 think the compromise works.

14 And I would propose that we at
15 least try to compromise. When you see the
16 nature of the redactions that Mr. Schmidt has
17 done I think you'll see that we're only
18 talking about the hard core financial
19 information for the most part.

20 JUDGE SIPPEL: Well, I understand
21 that. I'm going to refer to Mr. Furman and I
22 think that's basically no problem. But since

1 we're only eliminating -- Oh, you're saying to
2 me -- I see what you're saying. You're saying
3 on cross examination that you may be getting
4 into some stuff. All right.

5 MR. CARROLL: I've seen cross --

6 JUDGE SIPPEL: I know you'll get
7 into stuff. All right. Well, how about doing
8 the stuff towards -- Can we begin the cross
9 examination and then you say, "Okay, I've got
10 -- Your Honor, I now have" --

11 MR. CARROLL: I cannot do that and
12 that would not be fair to the scope of the
13 cross. I have to be able as you saw yesterday
14 with Mr. Hawkins. It is vitally important
15 that I be able to pick moments when I do
16 things in the order that I do them and I don't
17 have the time in this expedited proceeding to
18 sort of partition it in that way and then be
19 isolated from going back to it if it connects
20 up with something else I'm doing. I think
21 that really ties my hands in a cross
22 examination.

1 JUDGE SIPPEL: I'll accept that at
2 face value. But let me ask the next question
3 I have and that is some of this, these
4 materials, even in the emails as though they
5 may be considered sensitive and certainly the
6 parties are going to have a better insight
7 into that than I am. But a lot of that seems
8 to me like it's historical data. I mean
9 drawing the line on protected trade secret
10 materials and sensitive commercial information
11 it's not the easiest thing in the world even
12 if you take time to do it. And if we're going
13 to err on the side of well, we'd better
14 protect it because we're not sure, I'm not too
15 happy with that approach.

16 MR. CARROLL: That's a fair point.
17 As Your Honor knows from the evidence so far,
18 there are those MFNs that apply in this
19 industry and there's a lot of competitive
20 interest in the marketplace in businessmen
21 knowing what the terms of other deals are
22 because it affects what they think they might

1 be able to negotiate for. One of the reasons
2 that the historical information remains very
3 relevant today is that in the marketplace when
4 you're negotiating for transactions the other
5 guy always wants to know whatever he can know
6 about your other deals.

7 JUDGE SIPPEL: Makes imminent
8 sense. I was thinking about it at 4:00 a.m.
9 this morning.

10 MR. CARROLL: Okay. 4:00 a.m.
11 this morning?

12 JUDGE SIPPEL: My question is --
13 Well, I wake up early. My question is however
14 at some point in time that becomes basically
15 useless information. I mean somebody's going
16 to walk in with a couple of nuggets that they
17 picked up in this transcript or something to
18 a negotiation a year from now or two years
19 from now and the other side is going to say,
20 "Go fly a kite. That stuff doesn't mean
21 anything. We're in this year. We're not in
22 last year." Numbers change and profits

1 change. Projections change. Everything
2 changes in that business. In any business.

3 I'm sorry.

4 But that's my horse backed
5 reaction to it. That's my layman's
6 appreciation of the significance of this
7 situation. But I'm just not convinced that
8 all of these emails need to be protected that
9 way.

10 MR. SCHMIDT: That's something
11 that, Your Honor, we'll be mindful of. The
12 problem we have with a lot of this data is
13 it's a very dynamic marketplace.

14 JUDGE SIPPEL: Yes, sir.

15 MR. SCHMIDT: Comcast is always in
16 the process of negotiating agreements. We've
17 negotiated two agreements just in the past few
18 days that we told the Court about yesterday.
19 These are long agreements. They look back at
20 the agreements that have been in place across
21 the last several years. They go forward.

22 One of the ones we talked about